NO. 82-6448

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

RAMON PEDRO HERNANDEZ,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. DID THE TRIAL COURT ERR IN EXCLUDING FOR CAUSE FOUR VENIREMEN IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968)?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered January 20, 1982, is reported at 643 S.W.2d 397 (Tex.Crim.App. 1982) and is attached to the petition as Petitioner's Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on July 24, 1980, in El Paso County, Texas, for the murder of Oscar Martin Frayre, while in the course of committing burglary. Trial began in September, 1980, and on September 19, 1980, the jury found Petitioner guilty of the capital offense. After a punishment hearing wherein Petitioner requested that the jury assess the death penalty, on September 22, 1980, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.A.C.P. Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which, on January 20, 1982, affirmed the conviction and sentence. Rehearing was denied on January 18, 1983.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein.

The record in the instant case reflects no error under Witherspoon v. Illinois, 391 U.S. 510 (1968). Each of the four veniremen excluded for cause would have been unable to serve as fair and impartial jurors, based upon their opposition to the imposition of the death penalty. As such, no constitutional error is presented and this Court should decline to review this case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists. Further, this case presents only the question whether well-settled constitutional principles were correctly applied to the facts of this case. No important question of law is presented herein.

II.

THE TRIAL COURT DID NOT ERR IN EXCLUDING FOR CAUSE FOUR VENIREMEN IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held, inter alia, that in a capital trial, no veniremen could be excluded for cause for his views regarding the imposition of the death penalty unless he made unmistakably clear that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed" at trial. 391 U.S. 522-23 n.21. See also, Boulden v. Holman, 394 U.S. 478 (1969); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448 U.S. 28 (1980).

As the state appellate court held, the record reflects that each of these four veniremen were properly excluded because he or she would have been unable to serve as a fair and impartial juror consistent with Witherspoon principles.

Venireman Michael C. Knapp (SF 180-187) twice denied that he could ever vote to impose death in any case (SF 184). A third time, he reiterated that under no circumstances could he vote to impose death (SF 185) and that no one could change his mind (SF 185). Under examination by defense counsel, he maintained that he could not imagine any crime so terrible wherein the defendant should merit the death penalty (SF 186). Knapp's responses were sufficient to permit his exclusion consistent with constitutional principles.

Venireman Frances Bradley (SF 301-317) several times equivocated whether she could ever consider the imposition of the death penalty. She first maintained that her conscience would not permit her to vote for the imposition of capital punishment (SF 312), but then indicated that she was not unalterably opposed in some cases (SF 312). Next she reversed herself, however, reiterating that her conscience would not permit her vote for death (SF 312). While she next stated that in an intentional child-murder case, she could consider capital punishment (SF 313), she then stated that there was no case "grave enough" to permit her vote for death, and that she was firm in this (SF 313). Upon examination by the defense, she again stated that she might consider death in a case such as an intentional child-murder (SF 314-315). When pressed by the court, however, she retracted this (SF 315-16). Although Petitioner argues that Bradley's final response was equivocal, as the Court of Criminal Appeals found,

> ...the trial judge, who is present to hear the tone of voice and observe the demeanor of the venire members as they answer questions, is better situated to determine whether a particular venire member is in fact unequivocally committed to vote against imposition of the death penalty...

643 S.W.2d at 406. The state court's holding that Bradley would have been unable to serve as a fair and impartial juror is correct.

Venireman Virginia Gonzalez (SF 336-347) also initially equivocated in her responses. She initially maintained numerous times that under no circumstances could she vote to impose the death penalty (SF 340, 341) but then stated that there were a few cases in which she could do so, indicating her confusion (SF 342-345). Upon final questioning by the trial court, however, she denied that she could ever vote to

"send a man to his death." (SF 347). Thus, her exclusion did not violate Witherspoon.

Finally, Petitioner contends that Charlotte Smith (SF 682-691) was excluded in violation of Witherspoon. At first, venireman Smith was unsure of her ability to vote for or against the death penalty. Under questioning by the court, however, she stated that she could not vote in such a way as to impose death (SF 688, 689). She maintained this position under questioning by defense counsel (SF 689) and reiterated her opposition to the court (SF 690). Her exclusion was proper, because, as the Court of Criminal Appeals found, the record reflects that Smith would have been unable to serve as a fair and impartial juror. 643 S.W.2d at 406-407.

As the state appellate court found, the exclusions of each of these veniremen presents no Witherspoon violation. As such, this Court should decline to review Petitioner's claims.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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